Supreme Court, U.S.
FILED
MAY 22 2006
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(2)

No. 05-1092

In the Supreme Court of the United States

JEAN MOUELLE AND GERMAINE MOUELLE,
PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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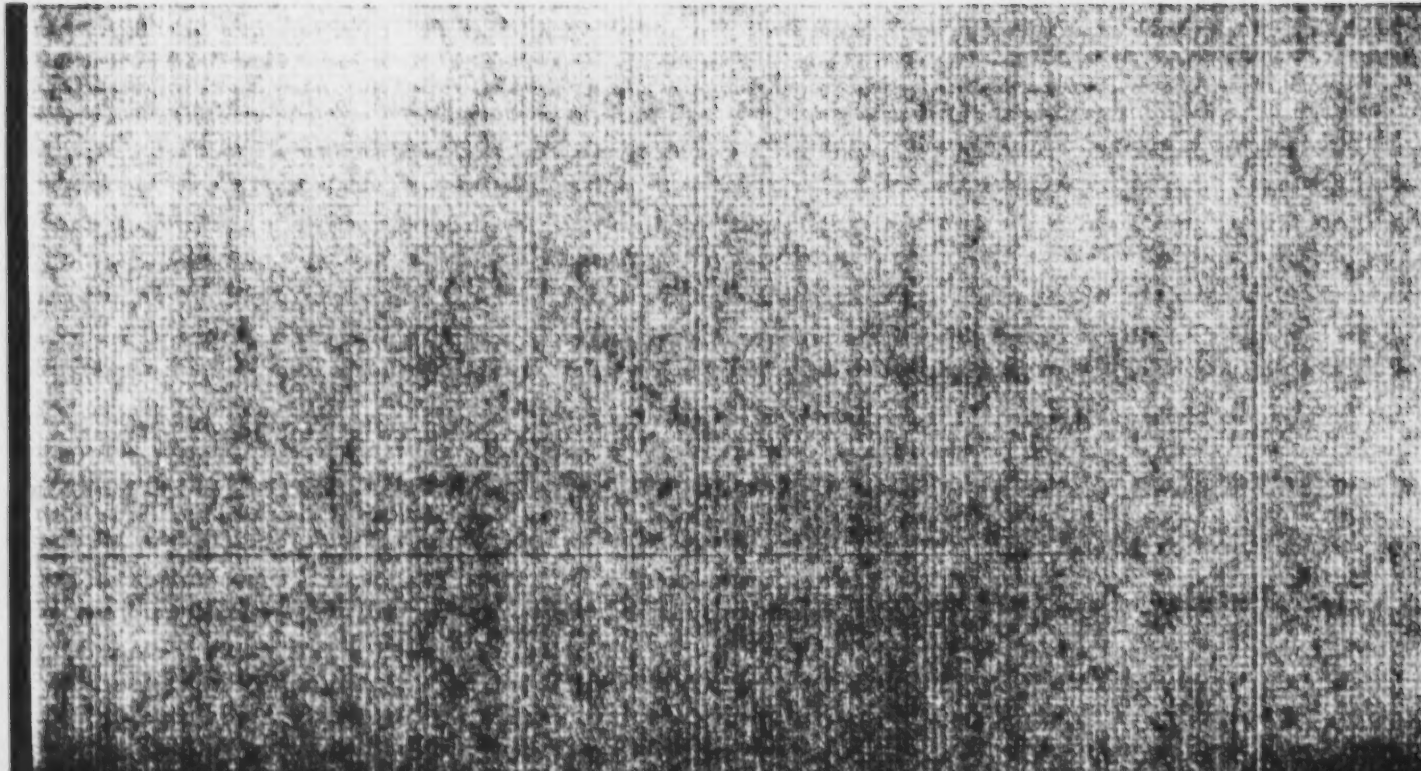

QUESTION PRESENTED

Under Section 245(a) of the Immigration and Nationality Act, 8 U.S.C. 1255(a), "[t]he status of an alien who was inspected and admitted or paroled into the United States * * * may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence" if certain conditions are satisfied. Under 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) (2005) (repealed May 12, 2006), an "arriving alien who is in removal proceedings," including one who has been paroled into the United States, is not eligible to apply for adjustment of status. The question presented is whether the regulations, as applied to paroled aliens, are inconsistent with the statute and therefore invalid.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 416 F.3d 923. The decisions of the Board of Immigration Appeals denying petitioners' motion to reopen (Pet. App. 15a-16a) and denying petitioners' motion to reconsider (Pet. App. 17a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2005. A petition for rehearing was denied on October 26, 2005 (Pet. App. 14a). On January 18, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 23, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 245 of the Immigration and Nationality Act (INA), 8 U.S.C. 1255 (2000 & Supp. III 2003), authorizes the Attorney General, in the exercise of discretion, to adjust an eligible alien's status to that of a lawful permanent resident alien. "[A]s an exercise of discretion," 62 Fed. Reg. 10,326 (1997), the Attorney General determined, through regulations most recently codified at 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) (2005) (repealed May 12, 2006), that an "arriving alien who is in removal proceedings" is not eligible to apply for adjustment of status.[1] An "arriving alien" is "an applicant for admission coming or attempting to come into the United States at a port-of-entry" and, with limited exceptions, "remains such even if paroled pursuant to section 212(d)(5) of the [INA]." 8 C.F.R. 1.1(q), 1001.1(q) (2005).[2] The regula-

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[1] The Attorney General's determination predated the enactment of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, which transferred the responsibilities of the former Immigration and Naturalization Service (INS) to the Department of Homeland Security (DHS), while retaining the Executive Office for Immigration Review (EOIR) under the authority of the Attorney General in the Department of Justice (DOJ). See 6 U.S.C. 275, 291, 521 (Supp. III 2003); 8 U.S.C. 1103(a) and (g) (2000 & Supp. III 2003). One of the regulations at issue here—Section 245.1(c)(8)—appeared in Chapter I of Title 8, which contains regulations of DHS; the other regulation—Section 1245.1(c)(8)—appeared in Chapter V of Title 8, which contains regulations of EOIR. The two provisions are identical.

[2] Section 212(d)(5) of the INA gives the Attorney General authority to parole from custody "any alien applying for admission" who would otherwise be detained until a decision is made either to admit or to remove the alien. 8 U.S.C. 1182(d)(5)(A). To exercise the parole authority, the Attorney General must find either that "urgent humanitarian reasons" justify the parole or that paroling the alien will yield a "significant public benefit." *Ibid.*

tions were adopted to prevent aliens who arrive illegally in the United States from "delay[ing] their removal through an application for adjustment of status," 62 Fed. Reg. 452 (1997), and to help "preserve the integrity of the visa issuance process," *id.* at 10,326, by requiring an arriving alien "to return to his or her country of residence and request [an immigrant visa] through the consular process," *id.* at 452.

The regulations that make arriving aliens in removal proceedings ineligible for adjustment of status have been challenged by petitioners and other aliens as inconsistent with Section 245 of the INA insofar as they apply to those aliens in removal proceedings who have been granted parole from custody. Those challenges rely on the language in Section 245(a) that gives the Attorney General discretion to adjust the status of aliens "inspected and admitted or *paroled* into the United States" if certain conditions are satisfied. 8 U.S.C. 1255(a) (emphasis added).[3] Four courts of appeals have held that the regulations are inconsistent with the statute, and therefore invalid, because they remove the ability to obtain adjustment of status for some aliens who are eligible to apply under Section 245(a) of the INA. *Scheerer* v. *United States Attorney General*, No. 04-16231, 2006 WL 947680 (11th Cir. Apr. 13, 2006); *Bona* v. *Gonzales*, 425 F.3d 663 (9th Cir. 2005); *Zheng* v. *Gonzales*, 422 F.3d 98 (3d Cir. 2005); *Succar* v. *Ashcroft*, 394 F.3d 8 (1st Cir. 2005). Two courts of appeals have upheld the regulations, finding that the denial of adjustment of sta-

[3] The conditions are (1) that "the alien makes an application for such adjustment"; (2) that "the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence"; and (3) that "an immigrant visa is immediately available to [the alien] at the time his application is filed." 8 U.S.C. 1255(a).

tus to the particular category of arriving aliens who are placed in removal proceedings but released on parole is a valid exercise of the Attorney General's discretionary authority to grant or deny adjustment of status. *Momin* v. *Gonzales*, No. 05-60119, 2006 WL 1075235 (5th Cir. Apr. 24, 2006); *Mouelle* v. *Gonzales*, 416 F.3d 923 (8th Cir. 2005) (decision below).

Recognizing that "the conflicting court of appeals decisions * * * will result in inconsistent application of the adjustment of status laws," the Attorney General and the Secretary of Homeland Security have determined that "having rules that apply nationwide is preferable to continuing to litigate the validity of [the regulations]." 71 Fed. Reg. 27,587 (2006). DHS and DOJ have therefore "undertaken to resolve the [circuit] conflict," *ibid.*, by issuing interim rules, effective May 12, 2006, *id.* at 27,585, that repeal 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8). 71 Fed. Reg. at 27,591. The effect of the repeal is to allow the designated administrative decisionmaker to "exercise discretion to grant applications for adjustment of status * * * by aliens who have been paroled into the United States and who have been placed in removal proceedings." *Id.* at 27,588. However, the interim rules make clear that, as was true under the regulations in effect prior to 1997, such aliens will ordinarily not be able to submit or renew applications for adjustment of status in the removal proceedings themselves. *Id.* at 27,587-27,588. Instead, consistent with longstanding limitations on the jurisdiction of an immigration judge (IJ), *id.* at 27,586, 27,587-27,588, adjustment applications filed by arriving aliens (including those released on parole) who are in removal proceedings will in most cases be adjudicated by United States Citizenship and Immigration Services (USCIS) in DHS.

Id. at 27,587-27,588, 27,591-27,592 (amending 8 C.F.R. 245.2(a)(1) and 1245.2(a)(1)).[1]

2. Petitioners, Jean Mouelle (Jean) and Germaine Mouelle (Germaine), are husband and wife and citizens of the Republic of Congo. In 1989, Jean entered the United States as a J-1 exchange visitor to study at the University of Idaho. Germaine entered the United States as the dependant of a J-1 exchange visitor. When their non-immigrant visas expired, petitioners did not return to the Republic of Congo. Pet. App. 1a-2a.

In May 1996, Jean Mouelle filed an application with INS for asylum and withholding of removal, naming his wife as a dependent. On May 31, 1997, while the application was pending, petitioners made a brief trip to Canada. Before departing, they sought and received advance parole, which allowed them to return to the United States to pursue their application for asylum. They returned on June 1, 1997, at Eastport, Idaho. Pet. App. 2a.

3. a. In April 1998, the INS commenced removal proceedings against petitioners. They were charged with inadmissibility under 8 U.S.C. 1182(a)(7)(A)(i)(I) and (B)(i)(II), for failing to present proper documentation upon reentering the United States in June 1997. Petitioners admitted that they were inadmissible, but renewed their application for asylum and withholding of removal. The IJ found petitioners inadmissible, denied their application for asylum and withholding of removal,

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[1] The rules retain an exception for an alien who leaves the United States while an adjustment application is pending, returns under a grant of advance parole, is placed in removal proceedings, and has his application denied by USCIS. In such a case, an IJ has jurisdiction to adjudicate a renewed adjustment application. 71 Fed. Reg. at 27,591-27,592 (amending 8 C.F.R. 1245.2(a)(1)).

and granted them the privilege of voluntary departure, subject to the posting of a bond. Pet. App. 2a-3a; Admin. R. 178-198.

In February 2003, the Board of Immigration Appeals (BIA) affirmed the IJ's decision. It revoked the privilege of voluntary departure, however, because petitioners had failed to post the required bond. Pet. App. 3a; Admin. R. 114-115.

b. While their appeal was pending before the BIA, petitioners had each sought an employment-based visa, by filing an I-140 Immigrant Petition for Alien Worker. In November 2001, Jean's petition was denied; in August 2002, Germaine's petition was granted. In May 2003, after the BIA had affirmed the IJ's decision, petitioners filed a motion with the BIA to reopen the removal proceedings. Petitioners requested a remand so that the IJ could adjust their status under Section 245(i) of the INA, 8 U.S.C. 1255(i), based on Germaine's approved visa petition. Pet. App. 3a-4a.[2]

In July 2003, the BIA denied the motion to reopen. Pet. App. 15a-16a. Citing 8 C.F.R. 1245.1(c)(8), it held that petitioners were "ineligible for adjustment of status

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[2] An alien may apply for adjustment of status under Section 245(i) if he or she is physically present in the United States, falls within one of the classes enumerated in Section 245(c) of the INA, and is the beneficiary of a petition for an immigrant visa filed with the Attorney General on or before April 30, 2001. 8 U.S.C. 1255(i)(1). The classes enumerated in Section 245(c) include aliens who are in "unlawful immigration status" or have "failed * * * to maintain continuously a lawful status since entry into the United States," 8 U.S.C. 1255(c)(2), and aliens who seek adjustment of status on the basis of an employment-based visa and are "not in a lawful nonimmigrant status," 8 U.S.C. 1255(c)(7). The Attorney General "may adjust the status" of an alien seeking adjustment under Section 245(i) if certain conditions are satisfied. 8 U.S.C. 1255(i)(2).

because they are 'arriving aliens' in removal proceedings." Pet. App. 16a. Petitioners filed a motion for reconsideration, which the BIA denied. *Id.* at 17a-19a.

4. Petitioners petitioned for review of the BIA's affirmance of the IJ's decision and its denial of petitioners' motion to reopen. Pet. App. 4a. The court of appeals consolidated the petitions and, in a divided opinion, denied them. *Id.* at 1a-13a.

a. The court of appeals first rejected petitioners' contention that the IJ violated their due process rights during the removal proceedings. Pet. App. 5a. The court held that petitioners failed to present that claim to the BIA, thereby depriving the court of jurisdiction to consider it, and, in any event, could not demonstrate prejudice. *Ibid.*

The court of appeals next rejected petitioners' contention that, because they were granted advance parole before leaving for Canada, they were not ineligible for adjustment of status under 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8), and that the BIA therefore erred in denying their motion to reopen. Pet. App. 6a-7a; see *id.* at 5a n.6. The court explained that the regulations render an "arriving alien who is in removal proceedings" ineligible for adjustment of status; that, under 8 C.F.R. 1.1(q) and 1001.1(q), "arriving alien" includes an applicant for admission who has been paroled into the United States; that the exception in Sections 1.1(q) and 1001.1(q) for aliens granted advance parole "is for the limited purpose of 8 U.S.C. § 1225(b)(1)(A)(i), which requires immigration officers to order some arriving aliens immediately removed 'without further hearing or review'"; and that Sections 1.1(q) and 1001.1(q) do not "allow aliens arriving with advance parol[e] to shed their arriving-alien

status for the purpose of adjusting immigration status." Pet. App. 6a-7a.

The court of appeals then rejected petitioners' contention that the BIA should have granted their motion to reopen on the alternative ground that 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) are inconsistent with Section 245 of the INA and therefore invalid. Pet. App. 7a-13a. "While Congress surely did speak to eligibility in [Section 245]," the court explained, "it left the question whether adjustment-of-status relief should be granted to the Attorney General's discretion." *Id.* at 8a. The court thus held that Congress has not "directly spoken to the precise question at issue," and that the regulations therefore are not invalid under the first step of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 8a (quoting *Chevron*, 467 U.S. at 842). The court then held that the "gap-filling regulations" were "reasonable in light of the legislature's revealed design," and thus valid under the second step of *Chevron*. *Id.* at 12a (quoting *Lopez* v. *Davis*, 531 U.S. 230, 242 (2001)). The court explained that applications for adjustment of status "would necessarily lengthen removal proceedings (much like they have here), and expediency was one of the goals of the 1996 amendments to the [INA]." *Id.* at 12a-13a.

b. Judge Bye filed a dissenting opinion. Pet. App. 13a. He would have held 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) invalid for the reasons identified by the First Circuit in *Succar*, *supra*. Pet. App. 13a.

ARGUMENT

Petitioners contend (Pet. 10-26) that 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) are inconsistent with Section 245 of the INA and therefore invalid. The court of ap-

peals correctly held otherwise; its decision has no prospective significance, because the regulations have been repealed; and this case would not be a suitable vehicle for deciding the validity of the regulations in any event, because petitioners appear to be ineligible for adjustment of status for independent reasons. This Court's review is therefore unwarranted. The Court may wish, however, to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the interim rules that repeal the challenged regulations.

1. a. Under Section 245 of the INA, the status of a paroled alien "may be adjusted by the Attorney General[] in his discretion." 8 U.S.C. 1255(a). As the court of appeals correctly recognized, "[a]dministrators vested with such discretion may exercise [it] by rule [rather than] on a case-by-case basis." Pet. App. 9a. Upholding a different regulation reflecting the exercise of the Attorney General's discretion under Section 245 of the INA, Judge Friendly observed that there is no "general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis." *Fook Hong Mak* v. *INS*, 435 F.2d 728, 730 (2d Cir. 1970). This Court has confirmed that, when a statute grants discretion to an administrative decisionmaker, "the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability." *Lopez* v. *Davis*, 531 U.S. 230, 243-244 (2001) (quoting *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612 (1991)).

The regulations at issue here are therefore valid as long as they satisfy the familiar two-part test of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*,

467 U.S. 837 (1984). The court of appeals correctly held that they do. Pet. App. 7a-13a. Because Section 245(a) of the INA "is silent on the manner in which the Attorney General is to exercise his discretion," *Momin* v. *Gonzales*, No. 05-60119, 2006 WL 1075235, at *11 (Apr. 24, 2006), Congress has not "directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842—*viz.*, whether the Attorney General may exercise his discretion by issuing a regulation that makes adjustment unavailable for a category of similarly situated aliens. And the regulations reflect "a reasonable policy choice," *id.* at 845, because they were adopted to prevent aliens who arrive illegally in the United States and are placed in removal proceedings from "delay[ing] their removal through an application for adjustment of status," 62 Fed. Reg. 452 (1997), and to help "preserve the integrity of the visa issuance process," 62 Fed. Reg. 10,326 (1997), by requiring an arriving alien "to return to his or her country of residence and request [an immigrant visa] through the consular process," *id.* at 452.

b. The regulations at issue in this case are analytically indistinguishable from the regulation upheld by this Court in *Lopez* v. *Davis*, *supra*. In *Lopez*, the Court held that a Bureau of Prisons (Bureau) regulation categorically denying early release to prisoners convicted of a firearm offense was consistent with a statute providing that the Bureau, in its discretion, may reduce the prison term of an inmate convicted of a nonviolent felony who successfully completes drug treatment. The Court agreed with the Bureau that the regulation was a permissible exercise of discretion "within the class of inmates who satisfy the statutory prerequisites for early release"—*i.e.*, those who were convicted of a nonviolent

offense and successfully completed drug treatment. 531 U.S. at 239 (quoting Bureau's brief).

So too here. Section 245(a) of the INA grants the Attorney General discretion to adjust the status of aliens who were "paroled into the United States" and satisfy certain conditions, 8 U.S.C. 1255(a), and the regulations merely provide that the Attorney General will not favorably exercise that discretion with respect to a subcategory of such aliens: those who are in removal proceedings. As in *Lopez*, the regulations are thus a permissible exercise of discretion "within the class of [aliens] who satisfy the statutory prerequisites for [adjustment of status]," 531 U.S. at 239—*i.e.*, those who were paroled and satisfy the other conditions in Section 245(a).

c. As the Fifth Circuit observed in upholding the regulations at issue here in *Momin*, *supra*, the four courts of appeals that have held the regulations invalid "all share a common trait": they "equate the entire class of parolees with the sub-class of parolees who are subject to removal proceedings." 2006 WL 1075235, at *12. Those courts "understand the regulation[s] to be in conflict with the statute" because "the regulation[s] make[] the latter class ineligible for relief and the statute makes the former class eligible for relief." *Ibid.* It is that understanding that "forms the core of the rationale for finding the regulation[s] invalid." *Ibid.*

As both the Fifth Circuit (in *Momin*) and the Eighth Circuit (in the decision below) correctly recognized, however, there is no legal or evidentiary basis for that understanding. 2006 WL 1075235, at *12; Pet. App. 12a n.9. On the contrary, the INA does not "mandate that parolees *must* be placed into removal proceedings," and in fact it "clearly provide[s] that at least *some* parolees

will *not* be placed into removal proceedings." *Momin*, 2006 WL 1075235, at *13. Indeed, according to DHS statistics, only a small percentage of parolees who entered the United States during a recent 12-month period (fiscal year 2003) have been placed in removal proceedings. See Resp. Supp. C.A. Br. 13 n.1. Even if "most aliens paroled into the United States were placed in removal proceedings," however, it would still be the case that Section 245 of the INA "does not show a congressional intent to vest a few, most, or all paroled aliens with the right to adjust their status." Pet. App. 14a n.9. Instead, "[r]elief remains discretionary." *Ibid.*

2. Review by this Court would be unwarranted even if the decision below were incorrect, because the regulations challenged by petitioners, and upheld by the court of appeals, have been repealed, effective May 12, 2006. 71 Fed. Reg. 27,585. That action was taken in interim rules issued by DHS and DOJ, both of which concluded that "having rules that apply nationwide is preferable to continuing to litigate the validity of [the regulations]." *Id.* at 27,587. By repealing the regulations, the interim rules themselves "resolve the conflict" in the circuits (*ibid.*) that petitioners have asked this Court to resolve (Pet. 10-15). And because the effect of the repeal is to allow USCIS to "exercise discretion to grant applications for adjustment of status * * * by aliens who have been paroled into the United States and * * * placed in removal proceedings" (71 Fed. Reg. at 27,588), the interim rules answer the question presented in the petition: whether the Attorney General may "categorically prohibit paroled aliens in removal proceedings from making such an application" (Pet. i). Accordingly, the question whether the regulations challenged by petitioners are valid has no prospective significance.

3. Even if there were some reason to decide the validity of the regulations despite their repeal, this case would not be a suitable vehicle for doing so, because petitioners appear to be ineligible for adjustment of status without regard to 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8). That is true for two independent reasons.

First, the record indicates that petitioners do not satisfy the requirements of Section 245(i) of the INA, the provision under which they sought to adjust their status. Under Section 245(i) and its implementing regulations, an applicant must be a beneficiary of a petition for an immigrant visa that was filed "on or before April 30, 2001," 8 U.S.C. 1255(i)(1)(B)(i), and was "approvable when filed," 8 C.F.R. 245.10(a)(1)(i)(A). A petition is "approvable when filed" if, as of the date of filing, it was "properly filed, meritorious in fact, and non-frivolous." 8 C.F.R. 245.10(a)(3). A petition is therefore "approvable when filed" if it is denied "due to circumstances that have arisen after the time of filing," *ibid.*, but not if it is denied "based on ineligibility at the time of filing," 66 Fed. Reg. 16,385 (2001). Germaine's petition was filed on February 20, 2002, Admin. R. 62, and thus was not filed on or before April 30, 2001. Jean's petition was filed on April 28, 2001, but it was denied because he could not show that "it was in the nation's interest for the Attorney General to waive the job-offer requirement of 8 U.S.C. § 1153(b)(2)(B)." Pet. App. 3a.[*] Because that

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[*] A job offer is one of the requirements for obtaining the employment-based immigrant visa that Jean sought. 8 U.S.C. 1153(b)(2)(A). The Attorney General may waive that requirement if he deems waiver to be in the national interest. 8 U.S.C. 1153(b)(2)(B).

circumstance did not arise after the date of filing, Jean's petition was not approvable when filed.[7]

Second, it does not appear that petitioners satisfy the requirements of Section 212(e) of the INA, 8 U.S.C. 1182(e) (2000 & Supp. III 2003), which applies to applications for adjustment of status by aliens who entered the United States pursuant to J-1 exchange visas. The countries that assist their citizens in obtaining such visas do so with the expectation that the visa holders will receive advanced training or experience and then return home to benefit their countries. See S. Rep. No. 1608, 84th Cong., 2d Sess. 4-5 (1956). For that reason, under Section 212(e) of the INA, a J-1 visa holder is ineligible to apply for permanent residence in the United States until he "has resided * * * in the country of his nationality * * * for an aggregate of at least two years following departure from the United States," although the requirement may be waived in certain circumstances. 8 U.S.C. 1182(e) (2000 & Supp. III 2003). Petitioners do not satisfy the two-year foreign-residency requirement, and Jean has failed in his attempts to obtain a waiver. After winning the diversity visa lottery in 1994, Jean "obtain[ed] a 'no objection' letter from the Congolese government * * * to relieve him of the J-1 two-year foreign residency requirement," but he "did not get it before his ability to obtain a diversity visa had expired." Pet. App. 2a n.2. We have also been informed by DHS that the Department of State recommended against granting Jean a Section 212(e) waiver in October 2004

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[7] Petitioners' ineligibility under Section 245(i) was raised by DHS in its opposition to the motion to reopen that petitioners filed with the BIA. Admin. R. 54. It was also raised by respondent in the court of appeals as an alternative basis for denying petitioners' petition for review. Resp. C.A. Br. 20-24.

and that, on the basis of that recommendation, USCIS denied his request for a waiver in March 2005.

4. The BIA relied solely on 8 C.F.R. 1245.1(c)(8) in denying petitioners' motion to reopen, Pet. App. 15a-16a, and the court of appeals relied solely on 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) in denying the petition for review of the BIA's denial of the motion to reopen, Pet. App. 5a-13a. Those regulations have since been repealed. Moreover, the effective date of the interim rules repealing the regulations, and permitting USCIS to consider applications for adjustment of status by arriving aliens in removal proceedings, is May 12, 2006, and the new rules apply to all cases pending on administrative or judicial review on that date. 71 Fed. Reg. at 27,585, 27,588. The Court may therefore wish to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the interim rules.

We note, however, that under the new rules—as under the rules that were in effect prior to 1997, when the regulations petitioners challenge in this case were adopted—the IJ and BIA have no jurisdiction to consider an application for adjustment of status filed by an alien in petitioners' position. Only USCIS may consider such an application. 71 Fed. Reg. at 27,587-27,588, 27,591-27,592 (amending 8 C.F.R. 245.2(a)(1) and 1245.2(a)(1)). Accordingly, if the case were remanded to the court of appeals, and then to the BIA, it is likely that the motion to reopen would again be denied, on the ground that the IJ has no jurisdiction over petitioners' applications for adjustment of status.

Petitioners, moreover, do not require any action by the court of appeals, the BIA, or the IJ to pursue an adjustment application with the appropriate administra-

tive decisionmaker (USCIS). And petitioners may request that United States Immigration and Customs Enforcement grant an administrative stay of the execution of the final removal orders now in effect if they elect to pursue an adjustment application. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-485 (1999).

Although petitioners must pursue any application for adjustment of status with USCIS and face substantial obstacles on the merits if they do, as matters now stand the BIA's denial of petitioners' motion to reopen rests solely on a regulation that is no longer in effect. For that reason, if this Court remands the case to the court of appeals, that court in turn might choose to remand the case to the BIA so that the BIA could reconsider the motion to reopen in light of the interim rules that repeal the regulation on which the BIA relied.

If this Court does not remand the case to the court of appeals for further consideration in light of the new rules, however, the petition for a writ of certiorari should be denied. The regulations petitioners challenge have been repealed, and the question of their validity raises no issue of continuing importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of the interim rules issued by the Department of Homeland Security and the Department of Justice on May 12, 2006, 71 Fed. Reg. 27,585. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

MAY 2006

FILED
JUN 6 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 05-1092

IN THE

Supreme Court of the United States

Jean Mouelle and Germaine Mouelle,
Petitioners,

v.

Alberto R. Gonzales.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
(Counsel of Record)
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

June 6, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

REPLY BRIEF FOR THE PETITIONERS

The question presented by the petition for certiorari is whether 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) – which at the time the petition was filed prohibited parolees in removal proceedings (such as petitioners) from applying for adjustment of status – are inconsistent with Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, and thus invalid. As described in the Brief for the Respondent, these regulations were repealed on May 12, 2006. See 71 Fed. Reg. 27,585, 27,587 (2006). The repeals are "applicable to all cases pending administrative or judicial review on or after May 12, 2006." *Id.* at 27,588. The judgment should accordingly be vacated and the case remanded in light of the regulatory change.

1. Respondent's continued insistence that the decision below was correct, Resp. Br. 9-12, is wrong, as the government's decision to abandon the regulations strongly suggests, see also Pet. 12-26. Moreover, it is purely academic, because the regulations that rendered petitioners ineligible to apply for adjustment of status have been repealed. Moreover, respondent's position that petitioners "appear to be ineligible for adjustment of status without regard to 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8)," Resp. Br. 13, was never addressed by either the BIA or the Eighth Circuit, see *id.* 15.

2. The sole issue before this Court is instead the appropriate disposition of the petition in light of the repeal of the regulations. Because the regulations have been repealed, the only basis in the record on which petitioners were denied the ability to seek an adjustment of status no longer supports the judgment below. As respondent acknowledges, the BIA and the court of appeals relied solely on the repealed regulations in denying petitioners the ability to reopen the removal proceedings to allow them to apply for adjustment of status. See Resp. Br. 15.

Respondent is thus correct that the appropriate course in this case is to "grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the interim rules." Resp. Br. 16. See, *e.g.*, *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981) (granting, vacating, and remanding the case for further consideration in light of intervening passage of the Economic Tax Recovery Act of 1981); *Lawrence* v. *Chater*, 516 U.S. 163, 165 (1996) (per curiam) (granting, vacating, and remanding the case in light of an intervening administrative reinterpretation of the Social Security Act, given the government's suggestion that the court of appeals could either decide the case "in light of the Commissioner's new statutory interpretation or remand the case to the Commissioner for reconsideration in light of that interpretation").

Respondent's alternative suggestion – that this Court simply deny certiorari because petitioners can now "pursue an adjustment application with the appropriate administrative decisionmaker (USCIS)," while their motion to reopen "would again be denied, on the ground that the IJ has no jurisdiction over petitioners' applications for adjustment of status," Resp. Br. 15-16 – is unduly speculative. As noted above, the BIA's original denial of the motion to reopen relied exclusively on the preclusive effect of Section 1245.1(c)(8). The BIA has never considered whether the IJ has jurisdiction to consider petitioners' applications, and such a determination is for the BIA, rather than this Court, to make in the first instance. See *Schmidt* v. *Espy*, 513 U.S. 801 (1994) (granting, vacating, and remanding the case in light of intervening changes in the law despite the government's assertion that petitioners might nonetheless be unsuccessful under the new regime).

Finally, the question whether new regulations can, years after the fact, foreclose petitioners from pursuing their original application for adjustment of status – an application that was foreclosed solely by a newly repealed regulation that

they have consistently challenged as invalid under the Immigration and Nationality Act – remains a live question that the court of appeals and the BIA should address in the first instance. Thus, remanding this case for further proceedings is the appropriate treatment of the petition.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted, the decision of the Eighth Circuit vacated, and the case remanded for further consideration in light of 71 Fed. Reg. 27,585, 27,587 (2006) (repealing 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8)).

Respectfully submitted,

Pamela S. Karlan
STANFORD LAW SCHOOL
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
AKIN GUMP STRAUSS HAUER &
FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
(Counsel of Record)
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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